Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1340 (Fed. Cir. 2001). Nevertheless, the decision below confounds these obligations running in opposite directions, ignoring the difference in power and authority between obligations imposed on private parties by the Government and obligations to private parties acknowledged by the Government. *Adams*, 391 F.3d at 1224.

This distinction constitutes a major difference. First, the private parties' obligation to pay the government discussed in *Commonwealth Edison* was an assessment attributable to costs the assessed industry imposed on society, and thus a form of tax or special assessment. *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 40 n.11 (2000) (case involved "imposition of a financial burden in the nature of a tax"), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001). This case, on the other hand, resembles the taking of a specific, separately identifiable legal right—the sum attributable to the Employees' accrued overtime—rather than a tax. Unlike a tax, the 1995 Statute (P.L. 104-52 (Nov. 19, 1995)) eviscerates the Employees' unpaid wage claims, making the action a taking of their entire interest in their pending unpaid overtime claims. "The regulations [involved in successful regulatory takings cases] were challenged as being *so excessive as to destroy*, or take, *a specific property interest*." *Eastern Enter.*, 524 U.S. at 542 (Kennedy, J. concurring in the judgment, dissenting in part) (emphasis added). A tax, however, would appropriate only a portion of the Employees' claims, leaving the bulk of the Employees' overdue overtime wages intact.

Second, the appropriation of the Employees' money in this case is not in any way based on costs to the government arising from their work, but simply improves the government's general bottom line. While an assessment that takes property in its entirety is not perforce a taking, there must be some nexus

between the purpose to which the assessment will be applied and parties assessed. When an "exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of" administering the relevant funds, the exaction constitutes a taking. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).[5] For example, in *Eastern Enterprises*, coal companies had to pay for their retired employees' health benefits; in *Commonwealth Edison*, energy companies had to pay for the decommissioning costs of nuclear energy waste treatment plants. The 1995 Statute, which effectively annulled Petitioners' administrative law claims for unpaid overtime wages, did not impose a simple bookkeeping fee to reimburse the government for the costs of reviewing and tallying up old overtime records; it completely eviscerated the government's obligation to pay overtime. The 1995 Statute is a classic case of ignoring, "[t]he Fifth Amendment's guarantee . . . [, which] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Therefore, the equation in the opinion below of a fee imposed on a regulated industry with wages owed by the government to its own employees is a misapplication of *Eastern Enterprises*' reasoning well beyond its reach.

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5 This principle harks back to the classical nineteenth-century position that "taxation and takings differ in degree, not in kind," depending on the generality or specificity of the burden and benefit. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and its Broader Application*, 97 NW. U. L. REV. 189, 201–03 (2002). *See Dane v. Jackson*, 256 U.S. 589, 599 (1921) (state tax might "clearly result[] in[] such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation.").

II. Courts have long recognized intangible monetary claims such as those of the Employees as a form of property.

Contrary to centuries-old precedents, the decision below agreed with the Government that the Employees' claim was merely an "ordinary statutory obligation to pay money[, which] can never constitute property for purposes of the Takings Clause." *Adams*, 391 F.3d at 1223. *See Adams*, 2003 WL 22339164 at *6 ("[M]oney does not constitute property within the Fifth Amendment's Takings Clause."). The opinion below attempts to differentiate between the purportedly uncompensable action here and a taking of intangible property by examining the "nature of the interest" that is being regulated. If the interest is "a legally-recognized property interest," it is compensable, but if it is "an ordinary obligation to pay money," it is uncompensable. *Adams*, 391 F.3d at 1224.

A. Historical Treatment of Money and Claims for Money (Choses in Action) as Property

Although intangible property such as money has become increasingly important in recent years, money as a form of intangible property is a long-recognized legal concept. In his leading common law treatise, which strongly influenced the Constitutional Framers' view of property, William Blackstone treated money as a form of personal property, a chattel personal. 2 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *387 (1766). Money remains a recognized form of property because people earn it through their work, their ideas, or the careful stewardship of their assets. The Supreme Court has explicitly recognized the intangible results of such investments as constitutionally protected property: "'[P]roperty' extends beyond land and tangible goods and

includes the products of an individual's 'labor and invention.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing Blackstone and John Locke). *See also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 993–94 (2002) ("[A]s contract rights . . . enter into general circulation as investments or *money*, they become property." (emphasis added)). In this case, the money at issue is clearly the product of the compensable overtime labor of the Employees.

In this case, the government has not simply taken the Employees' money, but it has taken their labor without fulfilling the promise that their labor would be rewarded. The terms of that reward included the expectation that any dispute over their wages could be brought for six years. The 1995 Statute dashed those expectations by abrogating their administrative causes of action to recover money damages for their unpaid overtime wages. *See* Petition at 14–20 (on the contractual nature of debts for wages earned under a statutory framework). The decision below dismisses the Employees' claims for compensation for their own labor as "as nothing more than an allegation that money is owed." *Adams*, 391 F.3d at 1225. Yet, the concept of intangible personal property in law suits was ancient before the American Revolution when Blackstone discussed such property rights as choses in action—rights or damages recoverable only by a suit at law. 2 BLACKSTONE at *396–98 ("If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action .... [A]ll property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a chose in action . . . ."). *See id.* at *438. For a history of choses in action as a form of intangible personal property, see 7 WILLIAM HOLDSWORTH, *HISTORY OF ENGLISH LAW* 515–44

(2d ed. 1937). This Court continues to treat choses in action as "protected property interest[s] in [their] own right." *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996). *See Dames & Moore v. Regan*, 453 U.S. 654, 688-90 (1981) (takings claim for chose in action properly within jurisdiction of United States Court of Federal Claims).

Choses in action include the right to collect on debts of all kinds, including debts owed on contracts, as well as bonds, bills, notes, and checks. 7 HOLDSWORTH at 516. Choses in action to an ascertained sum of money (in other words, a debt) became effectively assignable through designation of the assignee as an attorney-in-fact as early as the fourteenth century. 7 HOLDSWORTH at 534. *See* 2 BLACKSTONE at *442. By the eighteenth century, equity enforced the assignment of debts as choses in action. 7 HOLDSWORTH at 535–36. Thus, the idea of treating unpaid debts as a form of property has an ancient lineage. Only by dismissing this history out of hand could the opinion below disregard the value of the Employees' legitimate unpaid overtime claims as a long-recognized form of intangible property. Nevertheless, the opinion, without discussion, insisted on distinguishing the long-recognized property interest in money and accrued obligations to pay money from "legally-recognized property interest[s]." 391 F.3d at 1224.

B. Theoretical Treatment of Money as Property, the Monsanto *Test*

While legal history supports the treatment of money and legal claims for money as forms of property, American constitutional history and theory also buttress the respectful treatment of such intangibles as property. James Madison, the principal author of the Constitution and the Bill of Rights, wrote that property, "[i]n its larger and juster meaning . . .

embraces everything to which a man may attach a value and have a right . . . . [A] man's land, or merchandise, or *money* is called his property." James Madison, *Property*, in THE MIND OF THE FOUNDER 186 (Marvin Meyers ed., rev. ed. 1981) (originally published in NATIONAL GAZETTE, March 29, 1792) (emphasis added).

This historic treatment of money and claims for money damages as forms of property continues through the present. "[C]ourts typically have recognized contract rights as a valuable form of property under the Takings Clause. In general, courts recognize that if someone is willing to bargain for and exchange some form of consideration for an intangible right, then the intangible interest is property." Michael J. Hostetler, Note, *Intangible Property under the Federal Mail Fraud Statute and the Takings Clause: A Case Study*, 50 DUKE L.J. 589, 605–06 (2000) (footnotes omitted) (protected property includes a person's time and choses in action).[6]

Not long ago, this Court discussed the method it used to analyze whether intangible legal claims constitute constitutionally protected property. The Court decided that trade secrets were a form of property because they were assignable, could form the res of a trust, and pass to a trustee in bankruptcy. *Monsanto*, 467 U.S. at 1001.

All of these attributes apply with equal force to the overtime claims at issue in this case. Choses in action regarding claims to collect contractual debts have been assignable for

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6 For a recent treatment of contract rights as a protectable property interest, see *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (state could not abridge bondholders' security rights by statutory amendment).

centuries. 7 HOLDSWORTH at 534.[7] Choses in action are treated as property in bankruptcy[8] and can constitute the subject of a trust.[9] Moreover, since before the Revolution, stealing a chose in action could result in prosecution for theft of property. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *234 (1769). *See* 7 HOLDSWORTH at 542. The Employees' unpaid overtime wages in this case are not an unfounded "allegation," *Adams*, 391 F.3d at 1224, or "a mere unilateral expectation or an abstract need." *Webb's*, 449 U.S. at 161. They are overdue unpaid wages for which the Employees worked, for which they filed claims that were clearly timely when made, that they have continued to pursue for over a decade, and that Congress explicitly recognized as valid in P.L. 103-329 § 640 (Sept. 30, 1994) ("Section 640"), only to abrogate them a year later when it realized the cost. Therefore, the Employees' unpaid wage claims, as choses in action, clearly meet the requirements of the *Monsanto* test warranting treatment as constitutionally protected intangible property.

III. The Government misreads *Eastern Enterprises* by protecting only "funds of money" under the Just Compensation Clause.

The decision below does more than summarily dismiss all statutory obligations of the federal government as mere "allegations of money owed." *Adams*, 391 F.3d at 1225. It would

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7 The Employees' claims in this case, as claims against the Government, while clearly transferable by inheritance, may be assignable subject to the limitations of 31 U.S.C. § 3727 (claims assignable to financing institutions or after warrant issued).

8 *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 471 n.7 (1974).

9 *City of Philadelphia v. Mancini*, 431 Pa. 355, 363, 246 A.2d 320, 324 (1968) (citing Scott on Trusts).

also unduly restrict money-based takings claims to accrued interest. It does so by adopting the phrase "fund of money" as a term of art. *Adams*, 391 F.3d at 1222–23. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338 (Fed. Cir. 2001). "Fund of money" is taken from the *dissent* in *Eastern Enterprises. Eastern Enter.*, 524 U.S. at 555 (Breyer, J. dissenting). The decision below equates "fund of money" to the phrase "identified property interest," used by Justice Kennedy in his concurrence in *Eastern Enterprises. Eastern Enter.*, 524 U.S. at 540 (Kennedy, J. concurring in the judgment). *See Adams*, 391 U.S. at 1224.

"For Justice Kennedy [in *Eastern Enterprises*], the question of whether the government has committed a taking depends on the specificity of the property interest affected; a generalized obligation that does not identify a *particular means of satisfaction* does not constitute a taking because it does not directly affect a specific property interest." Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 746 (2002) (emphasis added). In other words, Justice Kennedy used "identified property interest" to refer to a specific or particular property interest, in this case the quantifiable and individually ascertainable overtime wages due to each employee. *See Eastern Enter.*, 524 U.S. at 543 (Kennedy, J., concurring) ("The Coal Act neither targets a *specific* property interest nor depends upon any *particular* property for the operation of its statutory mechanisms." (emphasis added)). *See also* Krotoszynski, 80 N.C. L. REV. at 745 ("For Justice Kennedy, the essence of a takings claim is the identification of a specific res that the government seeks to seize or control . . . .").

The relevant issue for Justice Kennedy's analysis in *Eastern Enterprises* is whether the government has identified a

particular asset out of which affected parties will satisfy the obligation to pay. Krotoszynski, 80 N.C. L. REV. at 745. "The [Coal Act] simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Eastern Enterprises* at 540 (Kennedy, J. concurring). In this case, on the other hand, the Government has not imposed a general obligation to pay on the Employees, which they might satisfy in any means available to them (by for example, taking a loan, liquidating an investment, or selling real property), but instead has specifically confiscated their owed, unpaid overtime wages. The 1995 Statute is not indifferent as to how the Employees' elect to comply or the property they use to do so, because they must pay out of their accrued overtime wages.

Justice Breyer in dissent used "fund of money" in an attempt to distinguish interest on an interpleaded sum, which the Just Compensation Clause protects,[10] from the forced funding of retired coal workers' health benefits, which the dissenters (joined by concurring Justice Kennedy) would have exempted from Just Compensation Clause protection. Even Justice Breyer's opinion emphasizes that a "fund of money" entitled to Just Compensation Clause protection must be "specific" and "separately identifiable"; not that it be kept in a separate account. *Eastern Enter.*, 524 U.S. at 555 (Breyer, J. dissenting).[11]

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10 *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

11 The decision below apparently agrees with the Government's contention that there is no viable distinction between the Employees' claims for specific accrued unpaid overtime wages in this case and the assessments against energy companies' general funds in *Commonwealth Edison. Adams*, 391 F.3d at 1223. The decision below gives an unduly constrained meaning to the term "specific" in relation to property, confining it to an "actual sum of

This Court's recent decision on interest on lawyers' trust accounts (IOLTA) sheds light on the broad range of monetary property interests protected by the Just Compensation Clause. *Brown v. Legal Found.*, 538 U.S. 216 (2003). *Brown* recognized interest accrued in an aggregated IOLTA account as the property of the individual clients.[12] Thus an "identified property interest" or a "fund of money" might include money owed to many different individuals (as in this case). Each client in *Brown* could, however, ascertain the interest attributable to the client by simple calculations based on the amount on deposit, the rate of interest, and the length of deposit time. In this case, the Employees can similarly calculate the amount of unpaid overtime wages by multiplying total uncompensated overtime hours by the applicable overtime wage. In *Brown*, the "fund of money" arose out of a client's distinct amount of money on deposit. In this case, the unpaid overtime "fund of money" arises out of each Employee's distinct amount of time worked at the appropriate hourly overtime rate.

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money representing interest derived from ownership of particular deposits in an established account." *Adams*, 391 F.3d at 1224. No matter how specific to the particular individual employee, how readily ascertainable, and how clearly the wages could be pursued separately by each individual, the opinion below characterizes all monetary obligations other than interest on a particular deposit account (not even, apparently, the deposit account itself) as too general in nature to warrant takings protection. This issue is addressed above and in the Petition at 22.

12 This Court upheld the Washington State IOLTA program against a taking challenge in *Brown* only because the taking was "a mere technical taking." 538 U.S. at 236. The taking was "technical" because the amount of interest due to any specific client was negligible and the costs of distributing such a small amount of interest outweighed the benefit of the interest payments to the client. 538 U.S. at 235–37.

Professor Thomas Merrill has devoted a lengthy article to harmonizing the Court's treatment of intangible property in its recent takings decisions. Merrill, 86 VA. L. REV. 885. He equates "fund of money" to a "discrete asset," which he defines as:

> a valued resource that (1) is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth), and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community.

Merrill, 86 VA. L. REV. at 974.[13]

In this case, the Employees' unpaid overtime claims are

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13 Merrill discusses at length the status as property of legal claims based upon contract, such as the employment-related claims in this case:

> The property-as-ownership definition requires that the claimant have an irrevocable right to exclude others from discrete assets. Some rights grounded in contract will satisfy this definition, others will not. Most choses in action originate as *contract rights*, as do bonds, common stock, and *even money issued by the government. These interests are commonly regarded as property and are assumed to be protected by the Takings Clause*. . . . The holder of such an interest can call upon the full force and authority of the state to exclude others from interfering with the asset. And such interests are nearly always irrevocable either for a defined period of time (as with bonds) or indefinitely (*as with money*).

Merrill, 86 Va. L. REV. at 992–93 (footnote omitted) (emphasis added). The Employees address the equivalence of contractual employment rights with the statutory employment rights of employees in this case. Petition at 14–20.

choses in action, a well recognized form of intangible property, as discussed above. Overtime wages obligations under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, are created routinely, whenever covered employees in the public or private sector work overtime. Claims for unpaid overtime are enforced by federal government enforcement actions as well as by private actions. Like most other similar claims for money, overtime claims can be exchanged, at a discount, for cash.[14]

The Employees' overtime pay is specific and identifiable. Each Employee's overtime pay is readily ascertainable from employment records showing the number of overtime hours worked and that Employee's applicable overtime rate of pay. Like other valid claims for money damages, the Employees' claims for unpaid overtime are irrevocable except, as in this case, when abrogated by a statute effecting a taking of those claims.

Therefore, even if the Just Compensation Clause only protects money as an "identified property interest" or a " "fund of money," the Employees' unpaid overtime wages in this case constitute such a "fund of money." Like the IOLTA interest in *Brown*, the amount due to each Employee is readily ascertainable, even if it is not kept in a separate account. Unlike the IOLTA interest in *Brown*, the sums due to each employee are not negligible and represent significant wages to each employee in return for working overtime. The Employees' claims similarly meet Professor Merrill's definition of "discrete

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14 For the prevalence of payday loans, see Federal Trade Commission, Consumer Alert, *Payday Loans = Costly Cash*, February, 2000, available at http://www.ftc.gov/bcp/conline/pubs/alerts/pdayalrt.htm. For online sources of lawsuit financing, see http://www.lawsuitcash.com, http://www.legalfundinggroup.com.

assets" because each Employee's claim could be disaggregated and sold at a discount as a valid assignable legal claim to money.

IV. Public policy militates against allowing the government to renege on acknowledged debts.

Government should not be allowed, by retroactive regulation, to avoid payment of acknowledged government debts. If the government could do so, it could avoid paying government bonds and notes, which, like government wages, are ultimately paid out of general funds. Like the wages in this case, the trade-in value of the bond or note, if retired early, and often if held beyond maturity, is not apparent on its face, but is readily ascertainable by application of a simple formula (based on interest in the case on notes and bonds, and applicable overtime rates in the case of the wages at issue in this case).

The financial obligations of the United States government and its agencies constitute one of the most significant components of the international financial markets. Short-term treasury bills constitute a significant vehicle for federal fundraising, particularly to finance deficit spending. MARC LEVINSON, *GUIDE TO FINANCIAL MARKETS* 44–45 (1999). United States government agencies have also become "among the most important money-market borrowers." *Id.* at 45. United States Treasury bonds, known as "Treasuries," are the most widely held securities in the world. *Id.* at 60. Over four trillion dollars of Treasury obligations are in private ownership. Department of the Treasury, Bureau of the Public Debt, Summary of Treasury Securities Outstanding, May 31, 2005, available at http://www.publicdebt.treas.gov/opd/opds052005.htm.

The rates that government borrowers pay depends on

the security of the investment. In other words, governments pay more when they do not stand behind their financial obligations. LEVINSON at 61. If this Court declines to protect the government's obligations to pay overtime wages due to its own employees under the theories advanced by the Government below and adopted by the decision below, similar theories could undermine other government financial obligations. The self-imposed restraint of the Just Compensation Clause is an important support for maintaining fiscal discipline in this vital financial sector. *See United States v. Winstar Corp.*, 518 U.S. 839, 884 (1996) (plurality opinion); LEVINSON at 61.

Recognizing governmental financial obligations, including wage obligations to its own employees, as a form of property thus upholds long-standing precedents treating money as intangible property. It also strengthens the vision of the Founders by creating a fair and just society that values the hard work of its citizens. Madison seemed to be speaking directly to this situation in his essay on property:

> If there be a government . . . that prides itself in maintaining the inviolability of property; . . . which *indirectly* violates [individuals'] property . . . in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares—the inference will have been anticipated that such a government is not a pattern for the United States.

Madison, *Property*, at 188 (emphasis in original). In this case, the United States by statute informed its own employees that if they gave up their "hallowed" free time to work overtime, the government would compensate them accordingly. When the

government realized how much the compensation cost, it reneged on the deal. Fairness, justice, and fidelity to the Constitution would fulfill Madison's directive by recognizing the Employees' unpaid overtime wage claims as a valuable property right protected by the Fifth Amendment. Because of the significant public interest at stake in the recognition and enforcement of government obligations, this case merits the grant of *certiorari*.

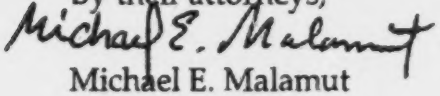
CONCLUSION

For the foregoing reasons, NELF urges this Court to grant the Petition of Petitioners Stephen S. Adams *et al.* for *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and DEFENDERS OF PROPERTY RIGHTS,

By their attorneys,



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Dated July 6, 2005

No. 04 - 1225

In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

V.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Armstrong v. United States,
364 U.S. 40 (1960) 7

Austin v. City of Bisbee,
855 F.2d 1429 (9th Cir. 1988) 5

Barrentine v. Arkansas-Best Freight System, Inc.,
450 U.S. 728 (1981) 6

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945) 6

Commonwealth Edison Co. v. United States,
271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535
U.S. 1096 (2002) 9

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 1

Fisk v. Jefferson Police Jury,
116 U.S. 131 (1885) 1, 5

Flemming v. Nestor,
363 U.S. 603 (1960) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Harrell v. Fleming,
285 F.3d 1292 (10th Cir.), *cert. denied*, 537 U.S. 1057 (2002) 8

In re Ford,
73 Comp. Gen. 157 (1994) 2

International Union of Electrical, Radio & Machine Workers Local 970 v. Robbins & Myers, Inc.,
429 U.S. 229 (1976) 3

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 8

Lynch v. United States,
292 U.S. 571 (1934) 1, 4

National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway,
470 U.S. 451 (1985) 8

New York Central Railroad Co. v. White,
243 U.S. 188 (1917) 6

Perry v. United States,
294 U.S. 330 (1935) 1

TABLE OF AUTHORITIES—Continued

Page(s)

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 1

United States v. Larionoff,
431 U.S. 864 (1977) 6, 7

United States v. Sperry Corp.,
493 U.S. 52 (1989) 8

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 1

OTHER AUTHORITY

141 Cong. Rec. 32,597 (1995) 3

Restatement (Second) of Contracts § 82 (1981) 3

ARGUMENT

The opposition concedes that the Federal Circuit held that federal employees have no property right to the wages they are owed for work already performed—and that the United States can unilaterally abrogate its own obligation to pay those wages without paying just compensation. Indeed, it argues that the Federal Circuit was entirely correct. Yet in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885), this Court squarely held that the statutory pay of public employees becomes a contractual entitlement once the work is performed, and has repeatedly held that the United States cannot abrogate its own contractual debts.

The opposition also concedes that there is a circuit split over whether *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), contains any holding of this Court at all, Opp. 21, but nonetheless (again) argues that the Federal Circuit was correct on the merits—that "a majority of this Court" in *Eastern Enterprises* in fact "determin[ed] that a mere obligation to pay an undifferentiated amount of money, not drawn from a specifically identifiable fund, is not property for purposes of the Takings Clause," Opp. 17-18. Yet this Court has held squarely and repeatedly[1] that ordinary monetary debts *are* property, and that seizing them is a *per se* Taking. The Federal Circuit's distinction between debts that relate to a "fund of money" and those that do not is an unsupportable and perilous innovation, and a serious misinterpretation of this Court's various opinions in *Eastern Enterprises*. Thus, this Court's review is urgently needed.

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[1] *See Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

1. The opposition's principal argument against certiorari is a suggestion that the 1994 statute reinstating petitioners' wage claims was a mere gratuity. The United States asserts that petitioners ignore the "context" of amended Section 640, and that "the combined effect of the two retroactive statutes [original and amended Section 640] was to leave petitioners no worse off (and in some respects better off) than when they performed the relevant work and filed their claims." Opp. 25. Petitioners agree that the "context" of amended Section 640 is significant, but the United States's portrayal is self-serving and incomplete.

Throughout the entire period when petitioners performed their work and filed their administrative FLSA claims, longstanding GAO and OPM precedent assured them that they had six years to file. The United States asserts without any record support that GAO "had begun actively reconsidering that ruling." Opp. 4. If so it kept those misgivings to itself. The first notice to petitioners that their limitations period would be shortened came *four years after their claims were filed*, when GAO suddenly overruled sixteen years of settled precedent in *In re Ford*, 73 Comp. Gen. 157 (1994). The United States insists in hindsight that GAO had been wrong all along, and that the two-year period adopted in *Ford* was always the law. But these petitioners were entitled to rely on GAO, and it assured them that they had six years. The fact that private sector workers have a two-year limitations period is thus beside the point; they were never affirmatively misled by the government.

Congress understood the fundamental injustice of GAO's decision and enacted Section 640, which required GAO to apply a six year statute of limitations to FLSA claims filed before June 30, 1994. But rather than considering their

claims, GAO thereafter stonewalled petitioners to gain time for the interested agencies to lobby Congress for a retroactive repeal. Indeed, counsel for GAO acknowledged that GAO "does not intend to issue a decision ... until the Treasury-Postal Service and General Government Appropriations Bill, 1996 ... is enacted (because of the possible retroactive repeal of § 640 ...)." Complaint ¶ 31, JA34. After months of intense lobbying by the agencies, Congress passed amended Section 640. Its sponsor explained that without some change in the law the United States was obligated to pay "as much as $ 460 million ... for work done many years ago." 141 Cong. Rec. 32,597 (1995).

Understood in its full "context," § 640 was hardly a gratuity. Congress recognized that it owed these petitioners wages for work already performed—and that if they "missed" the filing period the fault lay, in equity, with the United States and not with them. It thus extended the limitations period, thereby restoring its obligation to pay.

It is black-letter law that a debt rendered uncollectible by a statute of limitations nonetheless persists as a legal obligation, and that a subsequent promise to honor the obligation *is not* a gratuity that can freely be withdrawn. Such promises are enforceable at law even without a peppercorn of additional consideration from the creditor.[2] That rule is deeply rooted in the common law and prevents the United States from claiming that the restoration of petitioners' valid claims for unpaid wages was a "gratuity" simply because those claims may briefly have been

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[2] *See* Restatement (Second) of Contracts § 82 (1981). In a similar vein this Court has held that statutes reviving expired limitations periods do not violate the Due Process rights of the person who had benefited from the expiration. *See Int'l Union of Elec., Radio & Mach. Workers Local 970 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976).

uncollectible. It is settled law that "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch*, 292 U.S. at 579. The opposition's argument—that a promise to honor an obligation despite a limitations bar and the later retraction of that promise, taken together, leave the creditor no worse off—has been rejected under contracts law for centuries.

And in any event it is far from clear that the Takings Clause permits the government to seize a lawful obligation that is vested and currently payable, even if that obligation *was* entirely gratuitous. *Flemming v. Nestor*, 363 U.S. 603 (1960), held only that social security benefits can be modified *prospectively*. It did not embrace the United States's far more radical assertion that it can confiscate social security checks already due or even paid. Pet. 20 n.18.

Finally, even if these points were debatable, the United States's arguments on the merits do not diminish the significance of this case or the need for this Court's intervention. This Court could certainly correct the Federal Circuit's flawed holdings that federal employees never have an enforceable property right to their earned wages, or that monetary obligations are never property unless they relate to a "fund of money," regardless of whether it ultimately concluded that these petitioners prevail on the merits.

2. The United States concedes that "a contract with the United States can create a property right" protected by the Takings Clause, Opp. 12, but argues that petitioners have no contractual rights because the terms of federal employment are governed by statute. But the lower court cases it cites, Opp. 12-13, hold only that federal employees cannot claim to have been promised more than the relevant statutes provide. Those cases never suggest that the promises *made*

by those statutes do not give rise to enforceable obligations once the work is done. This Court squarely held in *Fisk* that the statutes governing the pay of public employees *do* create contractual obligations once the work is performed.

The United States has no coherent response. It protests that *Fisk* was decided under the Contracts Clause, but as the petition explained, "that is precisely the point. This Court held that a purely statutory obligation to pay wages *became* a contractual entitlement once the work was completed." Pet. 15. And even if "principles governing implied-in-fact contracts apply differently to the federal government" than to private parties, Opp. 14, which is by no means clear or relevant,[3] that does not remotely establish that those principles apply differently to the federal government than to *state* governments. Federal employment may be governed by statute, but so was the state employment in *Fisk*. 116 U.S. at 133. Finally, the opposition argues that in *Fisk* liability and damages had already been determined, whereas in this case the United States "has always disputed petitioners' right to FLSA compensation, and petitioners' claims still have not been resolved." Opp. 14. But whether the United States contests its lawful obligations does not change the fundamental nature of those obligations. And the fact that petitioners' claims have not been reduced to judgment is irrelevant; the same was true in *Lynch*, *Perry*, *Webb's*, and *Phillips*.[4] In

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[3] The contracts at issue here are not truly "implied-in-fact;" they are express and unilateral. Regardless, this Court has always held that the United States's contracts are governed by ordinary contract principles.

[4] To that extent *Austin v. City of Bisbee*, 855 F.2d 1429 (9th Cir. 1988), was wrongly decided. And even the United States does not genuinely believe that this case can be resolved by the truism that "'[n]o person has a vested interest in any rule of law entitling him to insist that it shall

any event, in the present posture this Court must accept as true petitioners' allegation that they are owed the money. And the blanket assertion that these claims "still have not been resolved" on the merits is false. Petitioners' entitlement to FLSA overtime has been extensively litigated, and the United States has already lost on the merits on many of petitioners' claims. *See* Pet. 4 n.4, 5 n.6.

The United States also argues that petitioners have no "contractual document" that could give rise to a contractual right to payment, and that the "Form 50" they signed "instead indicated that the FLSA did *not* apply to them." Opp. 13 (citation omitted). But the holding of *Fisk* is that no "contractual document" is necessary; the statutes governing public employee pay inherently give rise to a unilateral contract once the work is performed. And the United States's suggestion that language in the "Form 50" could alter its statutory obligations is both outrageous (what if that document had announced an intention to pay women less than men?) and inconsistent with its own argument that the terms of federal employment are purely statutory. An employee's FLSA right to overtime may not be waived.[5]

The United States attempts to distinguish *United States v. Larionoff*, 431 U.S. 864 (1977), on the ground that it involved "the interpretation of a statutory entitlement to compensation" rather than a Takings claim. Opp. 14. But

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remain unchanged for his benefit.'" Opp. 20 (quoting *N.Y. Cent. R.R. v. White*, 243 U.S. 188, 198 (1917)). It concedes that persons *do* have a vested interest in some rules of law—*i.e.*, those that create vested property rights. Opp. 16-17. Petitioners have no quarrel with the assertion that a cause of action must protect a "property interest" to be property itself. Opp. 20. Their causes of action plainly satisfy that test.

[5] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

this Court interpreted the statute in *Larionoff* the way it did only to avoid the "serious constitutional questions" that it perceived would be presented by any statute which "deprive[d] a service member of pay due for services already performed, but still owing." 431 U.S. at 879. This Court's invocation of constitutional doubt in *Larionoff* may not be a "definitive resolution of the constitutional issue in this case." Opp. 14. But it certainly proves that these are serious constitutional issues which, now that they *are* squarely and unavoidably presented, deserve review.

3. The opposition argues that *Fisk* and *Larionoff* "addressed employees' rights to *compensation*," while "this case involves a *statute of limitations* for administrative claims." Opp. 15. But there is no difference for Takings purposes between abrogating a debt and rendering it unenforceable under a statute of limitations. Pet. 18 n.16.

The United States seeks to resurrect an argument that it made and lost in *Armstrong v. United States*, 364 U.S. 40 (1960). The plaintiffs in *Armstrong* had mechanics' liens on a boat that became unenforceable because of sovereign immunity when title to the boat passed to the United States. The United States argued that the interposition of sovereign immunity did not "take" the liens from the plaintiffs, but merely rendered them unenforceable. This Court held that "[s]ince this acquisition was for a public use, however accomplished," it did "take the property value of those liens within the meaning of the Fifth Amendment." *Armstrong*, 364 U.S. at 48-49. The United States's "immunity ... from enforcement of the liens [did not] relieve[] the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary." *Id.* at 49.